No. 78-691

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

DANIEL C. FOSTER, et al., Petitioners,

\- against -

MARYLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William A. Dobrovir
2005 L Street, NW
Washington, DC 20006

John F. Graybeal
Michael Fischer
1775 Penn. Ave., NW
Washington, DC 20006

Attorneys for Petitioners

October 24, 1978

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 12, 1978.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit (D.C. Civil 76-73) are not reported in the Federal Reporter System. Opinions were written by Judges Wilkey and Leventhal (in each of which Judge MacKinnon joined). These opinions are unofficially reported at 1978-1 Trade Cas. ¶62,077. On July 26, 1978, Judge Leventhal amended his concurring opinion. The opinions and the amendment appear at Appendix A. The United States District Court wrote no opinion.

JURISDICTION

The judgment of a panel of the Court of Appeals for the District of Columbia Circuit was initially entered on June 12, 1978. Petitioners filed a timely petition for rehearing which was denied by the Court of Appeals on July 26, 1978. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)(1976).

QUESTION PRESLNTED

Must plaintiffs in a civil antitrust case prove not only that the defendant's actions had the effect of unreasonably restraining trade, but also that defendant acted with unlawful intent?

STATUTORY PROVISIONS INVOLVED

The Act of July 2, 1890, ch. 647, §1, 26 Stat. 209, commonly known as the Sherman Act.

Section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy,

> in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §1 (1976).

STATEMENT OF THE CASE

Petitioners seek review of the Court of Appeals affirmance of the district court's directed verdict, entered against them at the close of their case. This is a class action. The plaintiff class, as certified by the district court, includes 1,151 home owners who obtained mortgage loans from the defendant between January 1971 and December 1975. The defendant, Maryland Federal Savings and Loan Association ("Maryland Federal"), is one of the largest thrift institutions in the Washington (D.C.) metropolitan area.

BACKGROUND

Almost everyone who buys a house borrows most of the purchase price. When money is tight and interest rates high, as they have generally been for years, the lender is the most indispensable party to the home purchase transaction and has the greatest bargaining power.

Purchasing a home is a complicated process. Home buyers invariably hire someone to arrange the transaction, which may include searching or certifying title to the property, purchasing title insurance, preparing and recording the deed, credit instrument or other legal documents, and conducting the settlement itself. Lawyers and title companies compete in offering these and other home purchase settlement services to prospective home buyers.

The prospective home owner is on unfamiliar ground in this maze of settlement procedures. Lenders, lawyers and title companies have an overwhelming advantage over their inexperienced customer. As at least one consequence of this unequal match, it has been said that this entire industry is characterized by an "elaborate system of referral fees, kickbacks, rebates, commissions, and the like as inducements to those firms and individuals who direct the placement of business."[1/] These abusive practices "rarely inure to the benefit of the home buyer, and generally increase total settlement costs."[2/] In summary, it is by no means unusual for the various players in this game, including lawyers, brokers, title companies, and financial institutions, to take advantage of their anxious customer's lack of experience.

> With the exception of only a handful of sophisticates who are themselves economically dependent upon some specific

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1/ U.S. Department of Housing and Urban Development; Report on Mortgage Settlement Costs (January 1972), p. 5.

2/ Id. at p. 5.

aspect of land sale and financing closing procedures and costs, most people (and certainly the consumer public in the form of casual buyers of and borrowers in real property transactions) are ignorant of cleverly concealed rebates, kickbacks, ty-ins (sic), price fixing and compounded resulting costs which are frequently encountered.

These sophisticated insiders have been singularly successful in developing procedures which have been implemented by state and federal legislatures, sanctioned by administrative agencies, and often misconceived, and thus tolerated by courts. 3/

THE FACTS IN THIS CASE

This case involves the widespread practice of savings and loan associations steering settlement business to favored lawyers. It is common that savings and loan institutions are established or run by lawyers. It is not surprising that it also is common for such institutions to require their borrowers to deal with particular lawyers or law firms as a condition of obtaining a mortgage loan. This practice ranges at least from Louisiana to New Jersey.4/ This particular case involves one of its more sophisticated variations. Maryland Federal does not require its borrowers to hire a particular law firm, but steers them there a little less directly. Following the

3/ Tuohey, C.B., Kickbacks, Rebates and Tying Arrangements In Real Estate Transactions; The Federal Real Estate Settlement Act of 1974; Antitrust and Unfair Practices, 2 Pepperdine L. Rev. 309 (1975) p. 309-310.

4/ See, e.g., Forrest v. Capital Building and Loan Association, 385 F. Supp. 831 (M.D. La. 1973) aff'd. 504 F.2d 1974 (5th Cir. 1974) cert. denied 921 U.S. 978 (1975); Mortenson v. First Federal Savings and Loan Ass'n, 549 F.2d 884 (3d Cir. 1977).

typical pattern, the savings and loan association and the law firm are closely interlocked. The scheme works as follows:

When a prospective home buyer-borrower is faced with having to engage the services of an attorney or a title company to conduct the settlement of the home purchase, he quickly discovers that settlement services are expensive. Many wish to "shop around" for the best price. Maryland Federal tells its borrowers that if they do not engage its own lawyers, the firm of Lancaster, Bland, Eisele and Herring ("Lancaster Bland"), then Maryland Federal will require certain papers to be prepared or reviewed by Lancaster Bland.5/ The law firm has agreed with Maryland Federal to charge the borrower $100.00 for doing this. Maryland Federal tells the borrower that he will have to pay this $100.00 fee. Needless to say, each borrower is also required to pay whatever fees are charged by his own lawyers or title company.

Thus the borrower has a "choice." He can hire a lawyer of his own, pay that lawyer, and pay another $100.00 to Lancaster Bland. Or he can hire Lancaster Bland to conduct the settlement. If he does, he saves $100.00, because when Lancaster Bland conducts the settlement it does not charge the other $100.00.

5/ For loans made in Charles County, Maryland, the role of Lancaster Bland is played by attorney Edward Digges.

This is, and was to one of the class members who testified at trial, an obviously attracive inducement to hire Lancaster Bland. The anticompetitive effect of this arrangement also is obvious. Maryland Federal's advice to its borrowers that they will have to pay a $100.00 surcharge if they hire anyone except Lancaster Bland, a sum they save if they hire Lancaster Bland, quite naturally steers settlement business to Lancaster Bland. The plaintiff class in this case are 1,151 home buyer-borrowers who in 1971-75 did not hire Lancaster Bland and who therefore had to pay Lancaster Bland the $100.00 surcharge. The anticompetitive steering effect of the $100.00 surcharge is demonstrated by the fact that during the same five year period 4800 Maryland Federal home buyer-borrowers hired Lancaster Bland and did not pay the $100.00 surcharge. This settlement business was worth well over $1,000,000.00 to the law firm.

All of the $100.00 goes to Lancaster Bland. But the relationship between Maryland Federal and Lancaster Bland is close indeed, as demonstrated by the way the two set up the $100.00 surcharge. Until December 31, 1970, the firm now called Lancaster Bland was named Welsh & Lancaster. T. Hammond Welsh, one of the senior partners in the firm, had been since 1963 the President and General Counsel of Maryland Federal. This was convenient. The offices of the law firm were (and still are) located at Maryland Federal's headquarters building in Hyattsville, Maryland.

At the end of December 1970, Mr. Welsh resigned from the law firm. As President of Maryland Federal, he replaced himself as General Counsel with his just-former law partner Richard B. Bland, already on Maryland Federal's board, and named Clifton Eisele, another member of the firm, Associate Counsel. On January 1, 1971, Maryland Federal and Lancaster Bland instituted the $100.00 surcharge. Prior to that time, Maryland Federal had required no Lancaster Bland (or Welsh & Lancaster) review and had imposed no surcharge. It had accepted the settlement work of any attorney rated A.V-1-g by the Mardindale-Hubbell law directory. When it imposed the $100.00 surcharge it dropped the Martindale-Hubbell qualification for non-Lancaster Bland settlement attorneys.

Maryland Federal argues in defense of the $100.00 charge that Lancaster Bland must review the work of any other lawyer to make sure that there is adequate security for the loan and that the legal papers are in order.[6/] This purpose is of course proper. But other savings and loan associations are able to achieve it without steering settlement business to a particular law firm. They do it by having trained non-

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6/ Maryland Federal took this position notwithstanding its concession that there are many other attorneys in the Maryland suburbs who are competent to conduct residential real estate transactions.

lawyer employees review the papers. They impose no charge for this service. This is in fact the practice of the first, third and fifth largest savings and loan associations in the Washington, D.C. metropolitan area. Each of them is thriving and their borrowers are able to shop for settlement services in a freely competitive market.

Maryland Federal could follow the practice of its local peers. This would increase its costs to some extent, as it would have to hire someone to review settlement papers. It would cost Lancaster Bland a good deal of business. At the same time, however, it would lead to substantial savings for many Maryland Federal borrowers. Most important, it would let other lawyers and title companies compete effectively with Lancaster Bland for the settlement business for all Maryland Federal borrowers, securing for each of them the benefits of fair competition.

REASONS FOR GRANTING THE WRIT

1. The practice which plaintiffs challenge in this case, although cloaked with "legitimate" business purposes, is in fact nothing more than a device which assures Lancaster Bland a steady supply of new clients. In dealing with this practice, the Court of Appeals departed from the principles of antitrust law as interpreted by this Court in United States v. United States Gypsum Co., ___ U.S. ___, 98 S.Ct. 2864 (1978) and in National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355 (1978). As it stands, this decision awards lenders, lawyers, brokers and title companies an unrestricted license to deprive consumers to the benefits of competition.

2. Plaintiffs asserted in the courts below (1) that the $100.00 surcharge is an illegal tying arrangement and (2) that the agreement between Lancaster Bland and Maryland Federal to implement the $100.00 surcharge is an unreasonable restraint of trade. The district court took the case away from the jury and directed a verdict for Maryland Federal at the close of plantiffs' evidence.

The U.S. Court of Appeals affirmed in opinions written by Judge Wilkey (for the Court) and Judge Leventhal (in which all three judges joined). Judge Leventhal's explanation for the Court's rejection of the plaintiffs' restraint of trade claim was:

> I add a word to note the problem, and it is a real problem as I see it, that an association may well, through its president or other managing official, be engaged in a combination in fact to "steer" legal business to its counsel (who may have business or personal ties with management, or both).
>
> If a borrower must pay extra out of his pocket when he hires another lawyer, but has no additional payment to make if he hires lawyer X, there is likely some steering of trade, and that is a "restraint."
>
> Where plaintiff fails in this case is that he made no tender of facts that such

steering as takes place has been venally motivated. And there is a justification for the system developed in defendant's institution--namely, (1) It wants its own counsel Mr. X (for its own protection); (2) It is willing to waive retainer of Mr. X when plaintiff has already hired him, thus avoiding either waste, or a double fee to Mr. X for doing the same work.

The combination of justification in terms of saving to the borrower plus lack of any showing of venality in the circumstances warrants a finding as a matter of law that there has been no showing of an unreasonable restraint of trade. 7/

Judge Wilkey's opinion also focuses on defendant's intent rather than on the anticompetitive effect of $100.00 surcharge:

The defendant's loan practice was instituted for a legitimate business purpose, and fully comports with plaintiffs' right to counsel and the defendant's statutory right to charge borrowers for incidental legal expenses. 8/

In short, the court below concluded that in order to establish a violation of the Sherman Act, plaintiffs had to prove that the challenged agreement was designed and implemented, at least in part, with the anticompetitive intent of inducing Maryland Federal borrowers to hire Lancaster Bland. This was clear error.

7/ Concurring opinion (Leventhal, J.) at pp. 1-2. (Emphasis added).

8/ Majority opinion (Wilkey, J.) at p. 14.

Plaintiffs' evidence had demonstrated that the challenged practice has all but strangled competition among settlement lawyers as regards borrowers from Maryland Federal. It has long been established that, at least for purposes of civil antitrust cases, a showing of an anticompetitive effect is sufficient to make out an unreasonable restraint of trade. No independent showing of unlawful intent is needed. In Times-Picayune Publishing Co. v. United States, 349 U.S. 594, 614 (1953), this Court explained:

Since the requisite intent is inferred whenever unlawful effects are found, United States v. Griffith, 334 U.S. 100, 105, 108 (1948); United States v. Patten, 226 U.S. 525, 543 (1913), and the rule of International Salt is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect. [Emphasis added.]

This Court's recent decision in United States v. United States Gypsum Company, ___ U.S. ___, 98 S.Ct. 2864, 2873 n.13 (1978), supports plaintiffs' position:

Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect. [Emphasis added.]

3. At trial, plaintiffs presented to the jury evidence which demonstrated that:

A. The $100.00 surcharge was set up jointly by Maryland Federal and Lan-aster Bland;

B. The natural effect of this scheme is to induce Maryland Federal borrowers to hire Lancaster Bland. Between 1971 and 1975, for example, 80 percent of all Maryland Federal borrowers hired Lancaster Bland as their settlement lawyers; and,

C. Many large and successful savings and loan associations in the Washington area are able to safeguard their legitimate business interests in a way which does not affect competition between lawyers and others for settlement business.

The jury reasonably could have concluded from these facts that the $100.00 surcharge unreasonably restrains trade, in violation of the Sherman Act, because of its anticompetitive effect, without regard to intent. The jury reasonably could have concluded that Maryland Federal and Lancaster Bland could and should have foreseen that the $100.00 surcharge would affect competition, and could thus be viewed as having in fact acted with unlawful intent. On both grounds, therefore, it was plainly error to affirm a directed verdict against plaintiffs on the ground that they had not proved unlawful intent.

4. In his concurring opinion (as amended) Judge Leventhal, joined by Judges Wilkey and MacKinnon, appears to suggest that although the $100.00 surcharge restrains trade, it does so only "incidentally", and is therefore permissible under the Rule of Reason. In so deciding, the

Court of Appeals ignored altogether National Society of Professional Engineers v. United States, the most recent decision in which this Court has dealt with the Rule. This Court explained in National Society, 435 U.S. at ___, 98 S.Ct. at 1365 that:

> In this regard the Rule of Reason has remained faithful to its origins. From Justice Brandeis' opinion for the Court in Chicago Board of Trade, supra, to the Court opinion authored by Justice Powell in Continental T.V., Inc., supra, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 246 U.S., at 238, 38 S.Ct. at 243; quoted in 433 U.S. 36, 39, 49 n. 15, 97 S.Ct. 2549, 2557, 53 L. Ed. 2d 568.

Thus, that a particular anticompetitive practice is "incidental" to a legitimate business practice is of no significance if in fact the challenged practice restrains trade. Other lending institutions find they can safeguard their legitimate interests without restraining competition among lawyers, "incidentally" or otherwise. In these circumstances, the $100.00 surcharge is an unreasonable, not merely an incidental or unavoidable, interference with competitive forces.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this petition be granted.

Respectfully submitted,

WILLIAM A. DOBROVIR
JOHN F. GRAYBEAL
MICHAEL FISCHER

Attorneys for Petitioners

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1455

DANIEL C. FOSTER, ET AL., APPELLANTS

v.

MARYLAND STATE SAVINGS AND LOAN ASSOCIATION

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 76-73)

Argued 27 October 1977

Decided 12 June 1978

Judgment entered this date

William A. Dobrovir with whom *Cornish F. Hitchcock, John F. Graybeal, Michael D. Fischer* and *Benny L. Kass* were on the brief, for appellants.

John P. Arness with whom *David J. Hensler* and *Wallace A. Christensen* were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: LEVENTHAL, MACKINNON and WILKEY, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY

Concurring opinion filed by *Circuit Judge* LEVENTHAL

Concurring statement filed by *Circuit Judge* MACKINNON

WILKEY, *Circuit Judge*: This private antitrust action challenges, as a violation of Section 1 of the Sherman Act,[1] the practice followed by the defendant of requiring borrowers to pay an attorney's fee charge for services rendered to the defendant in connection with each loan. The defendant is a federally-insured mutual savings and loan association, engaged in the business of making loans on residential property. The defendant requires borrowers to pay the attorney's fee charge only if they employ counsel other than the law firm retained by the defendant, and waives the requirement where borrowers use the defendant's law firm for settlement. Plaintiffs are a class of those borrowers who paid the attorney's fee charge as a cost of their loans because they employed their own counsel for legal settlement services.[2]

Plaintiffs contend that the defendant's loan practice constitutes a *per se* illegal tie-in sale of legal services to the sale of credit, and an unlawful restraint of trade on the market for legal settlement services. At the close of plaintiffs' case, the District Court directed a verdict in

[1] 15 U.S.C. § 1 (Supp. V 1975).

[2] Plaintiffs include four named plaintiffs and approximately 1,151 home buyers who obtained loans from the defendant during the period between January 1971 and December 1975. Over the same span, the defendant made loans to approximately 4,800 home buyers who were not required to pay the attorney's fee charge because they retained the services of the defendant's law firm in the first instance.

favor of the defendant on the alleged antitrust violations. Plaintiffs now challenge the District Court's ruling on the ground that their evidence sufficiently made a case for the jury.

In determining whether a directed verdict is appropriate the governing principle is that a directed verdict is proper where, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict.[3] Under this principle the court is bound to view the evidence in the light most favorable to the plaintiffs, giving them the advantage of every fair and reasonable inference that the evidence may justify.[4] Examining the record in the light of this principle, we agree with the District Court that the evidence and permissible inferences therefrom conclusively demonstrate that no tying arrangement or unlawful restraint of trade is presented by the circumstances of this case. We accordingly affirm.

I. THE ALLEGED TYING ARRANGEMENT

Before developing the antitrust law on tie-in sales, it is essential to have clearly in mind what services are involved here, and to whom. Of the $100 standard legal fee paid by the defendant lender to its selected counsel and charged as a cost of the loan to the borrower, $35 is for the preparation of a mortgage. Mortgages are the business of the lender; it has a definite interest in the validity of the security instrument and prudently should only accept an instrument prepared or approved by its own counsel. Sixty-five dollars is for examination of the title. In this matter both the lender and the borrower

[3] *Klein* v. *District of Columbia*, 133 U.S. App. D.C. 129, 132, 409 F.2d 164, 167 (1969).

[4] *Id.*

have an interest; a common interest—yet in this metropolitan area, where the percentage of the value loaned on homes is substantial, the lender ordinarily will have the greater financial stake in the title, as he initially puts up more of the purchase money. While title insurance is customarily purchased by the borrower (it may be required by the lender), title insurance policies frequently carry exceptions, whose legal effect must be evaluated by both parties to the loan transaction.

The lender has the same right as the borrower to insist on its own counsel. The defendant lender here, after an unsatisfactory period of experience permitting the borrower to select his own counsel from a large group of highly rated lawyers (but not necessarily real estate specialists), whom the lender would then use as well, settled upon the practice of employing only one law firm to protect its interest in all these similar home loan transactions. State law and federal regulations allow the lender to charge the borrower for the legal work done for benefit of the lender as a necessary cost of the loan. Irrespective of which counsel is chosen by the borrower, the borrower will thus inevitably pay for the legal services provided to the lender.

The only practical question is whether the borrower will pay for his own separate legal counsel, as well as the lender's, where the interests of the two parties are congruent. Since the parties have identical interests in the validity of the title, and since any conflict between lender and borrower in regard to the mortgage instrument is mostly theoretical (the lender will not lend unless the mortgage is completely satisfactory to it, and probably will insist on using its own mortgage form), one lawyer can effectively and fairly serve both lender and borrower on all questions in which the lender is interested. The borrower-buyer, of course, needs counsel for other purposes concerning, *e.g.*, his legal relation to the seller of the property.

This being the parties' situation in the usual home sale and purchase-mortgage transaction, beginning in 1971 the defendant lender adopted the policy of waiving the $100 fee it customarily paid its selected counsel and charged the borrower, if the borrower also employed this same law firm and paid the firm directly for all services rendered to the borrower (which services, as shown above, necessarily embraced the two areas—title validity and the mortgage instrument—of interest to the lender).

After this detailing of the fact situation, we turn to the law of tying arrangements. A tying arrangement has been defined as an "agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product."[5] Such arrangements are presumptively unlawful under the antitrust laws, "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."[6] Before an unlawful tying arrangement may properly be found, however, it must be determined that "two separate products are in fact involved."[7]

The record in this case clearly reveals that separate products were not involved in plaintiffs' "purchase" of the residential property loans. The loan review services performed by the selected law firm were provided to and paid for by the defendant as an additional means of in-

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[5] *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5 (1958).

[6] *Id.* at 6.

[7] *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507 (1969).

suring the security of its loans.[8] The attorney's fee charge collected by the defendant to pay for these services was not demonstrably excessive, and did not enable the defendant to secure a profit.[9] Pursuant to both federal regulation[10] and Maryland state law,[11] the defendant was authorized to charge its borrowers for these legal expenses. Under these circumstances, plaintiffs' payment of the attorney's fee charge to the defendant lender represented an incidental and inseparable part of their "purchase" of the loans, rather than the "purchase" of a tied product.

Forrest v. *Capital Building & Loan Association*[12] involved a practice identical in all material respects to the

[8] Every member of plaintiffs' class purchased legal settlement services from an attorney other than the defendant's. Although the legal services purchased by plaintiffs from their own attorneys constitute a separate or distinct product, the additional loan review services paid for by the defendant do not, since they were purchased by plaintiffs merely as an incident to the loan transaction.

[9] Contrary to plaintiffs' assertions, no evidence was introduced to demonstrate that the $100 charge collected by defendant and paid to its attorney exceeded the amounts charged by other attorneys for similar legal services. The defendant's only economic interest in these loan transactions was the premium and interest it earned on the loans, since it remitted all of the fees to the law firm, without any profit. J.A. at 329, 463.

[10] 12 C.F.R. § 563.35(c) (1975) (current version at 12 C.F.R. § 563.35(d) (1977)). *See* p. 10 *infra*.

[11] MD. CODE ANN. art. 23, § 161GG (1973). *See* p. 11 & note 24 *infra*.

[12] 385 F. Supp. 831 (M.D. La. 1973), *aff'd per curiam*, 504 F.2d 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975). *See also Kinee* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, 1974-1 Trade Cas. ¶ 74,927 (E.D. Pa. 1973), *cert. denied*, 419 U.S. 999 (1974); *Spens* v. *Citizens Federal Savings & Loan Ass'n*, 364 F. Supp. 1161 (N.D. Ill. 1973).

residential loan practice at issue in this case. The defendant savings and loan associations permitted their borrowers to employ an attorney of choice for legal settlement services, but required borrowers as a condition of a loan to pay the legal fees of attorneys selected by the defendants to examine titles, render title opinions, and prepare necessary security instruments. As in this case, the defendants were entitled under both federal and state law[13] to charge their borrowers for legal expenses. In a suit brought by individual attorneys, the District Court rejected the contention that the loan practice constituted a *per se* illegal tie-in of legal services, and concluded instead that no two products were involved.[14]

This conclusion, which was explicitly adopted by the Fifth Circuit in its per curiam affirmance of the District Court,[15] was premised on the finding—equally applicable here—that *the legal services were provided to the defendants, rather than to the defendants' borrowers. As such, these services were "not 'for sale' to prospective borrowers,"* but were merely "incidental" to an "arrangement . . . sanctioned by both federal regulation and by state law."[16]

[13] The same federal regulation as is applicable here was involved in *Forrest*. 385 F. Supp. at 837. In addition to authorizing the charge for legal expenses, the state law in *Forrest required* the lender's attorney to certify that the property securing a loan was unencumbered. *Id.* at 836-37. Maryland law appears to contain an analogous prevision. *See* Regulation 09.05.50C of the Maryland Division of Building, Savings & Loan Associations Guide. We need not decide whether the state law provisions in *Forrest* and in this case impose identical *requirements* on a lender, however, since Maryland law at least *authorizes* the defendant to charge for legal expenses. *See* p. 11 & note 24 *infra*.

[14] 385 F. Supp. at 836.

[15] 504 F.2d at 891.

[16] 385 F.2d at 837 (emphasis added).

Notwithstanding plaintiffs' protestations to the contrary, we find the analysis of the identical practice in *Forrest* persuasive.[17] As previously noted,[18] plaintiffs have not been restricted in the exercise of their right to counsel in this case. The defendant's decision to purchase legal services at a cost to plaintiffs was both legally authorized and motivated by the legitimate business concern of insuring the security of its loans. Incidental servvices purchased by the seller (lender) for legitimate business reasons cannot be viewed as a separate (or tied) product, merely because the buyer is charged for them.[19]

[17] Plaintiffs have attempted to distinguish the findings in *Forrest* from the facts of this case on two grounds, both of which are spurious and unsupported by the evidence. First, relying on testimony by the defendant's president that borrowers "benefited" from the loan review services performed by the defendant's law firm, plaintiffs assert that these services were rendered to the borrowers and not to the defendant. App. Br. at 34. Not only is this testimony irrelevant to prove that the defendant's attorney acted as attorney for borrowers, it is also directly refuted by the testimony of plaintiffs' expert and of plaintiffs themselves. Their testimony conclusively demonstrates that borrowers did not purchase these legal services. *See, e.g.*, J.A. at 46-47, 64-65, 76, 86, 90, 275-76. The second purported distinction urged by plaintiffs is based on their two-fold assertion that here (unlike *Forrest*) title insurance was generally available to the defendant's borrowers, and that where title insurance is available the lender has no need of an attorney. App. Br. at 34-35. The assertion that title insurance and loan review services are alternatives ignores the fact that the function of these legal services was to examine title binders and determine which encumbrances and easements were excepted from title insurance coverage. J.A. at 270-71. The testimony in this case amply demonstrated the need for such services. *See, e.g.*, J.A. at 138-39, 149-52, 271-73.

[18] *See* pp. 5-6 *supra*.

[19] *See, e.g.*, *Kinee* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, 1974-1 Trade Cas. ¶ 74,927 (E.D. Pa. 1973), *cert. denied*, 419 U.S. 999 (1974); *Spens* v. *Citizens Federal Savings*

This is particularly true with respect to legal settlement services, since they represent an indispensable method of consummating the loan transaction from both the borrower's and the lender's viewpoints. Plaintiffs' argument that such services should be regarded as a tied product simply ignores the fact that the defendant has a statutory right to employ its own separate counsel to advise it and to charge the cost to its borrowers. We conclude, therefore, that no tying arrangement is involved in this loan practice.

II. The Alleged Unreasonable Restraint of Trade

Plaintiffs' next contention is that the defendant's loan practice, though not a *per se* illegal tying arrangement, is nevertheless an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[20] They argue that the defendant's practice unreasonably restrained competition in the market for legal settlement services by diverting borrowers exclusively to the services of the law firm retained by the defendant. Plaintiffs also assert that the practice was unreasonable in its effect because less restrictive alternatives were allegedly available to the defendant to obtain satisfactory legal settlement services.

Even if we assume that the arrangement between the defendant and its law firm to provide legal services on the defendant's loans may constitute a "combination"

& Loan Ass'n, 364 F. Supp. 1161 (N.D. Ill. 1973). *See also Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 252-54 (4th Cir. 1971); *Crawford Transport Co.* v. *Chrysler Corp.*, 338 F.2d 934, 938-39 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Nelligan* v. *Ford Motor Co.*, 262 F.2d 556 (4th Cir. 1959).

[20] 15 U.S.C. § 1 (Supp. V 1975), while literally declaring every restraint of trade to be illegal, prohibits only those restraints found to be unreasonable in purpose or effect. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 58-62 (1911).

within the meaning of Section 1,[21] the record conclusively shows that the defendant's practice did not result in an unreasonable restraint on competition in the market for legal settlement services. Every member of plaintiffs' class purchased the services of an attorney other than the law firm retained by the defendant. Although many of the defendant's other borrowers employed the defendant's attorney, their decision, as much as plaintiffs', was arrived at without restriction or coercion by the defendant. Absent any showing that the defendant's borrowers were precluded from selecting their own attorneys, or that they were prevented from going elsewhere to obtain a loan,[22] we fail to perceive anything more than a *de minimis* restraint resulting from the defendant's practice. Such restraint was reasonable, moreover, since the defendant was specifically authorized by federal regulation and by state law to use its own attorney at a cost to its borrowers.

The Federal Home Loan Bank Board regulation in effect at the time of the alleged antitrust infraction expressly permitted an association to require

> the borrower to pay an initial loan charge to reimburse the institution for legal services rendered to it by an attorney selected by the institution in connection with the processing and closing of a loan.[23]

[21] We do not decide this issue since we find that the defendant's practice is not unreasonable in purpose or effect.

[22] The record reveals that borrowers selected the defendant as their lender for any one of a number of reasons, *e.g.*, because it offered a competitive interest rate, J.A. at 36-37, 59; it enabled the borrower to save money, *id.* at 74; or it was conveniently located, *id.* at 87. None of these reasons suggests that borrowers were concerned about the attorney's fee charge.

[23] 12 C.F.R. § 563.35(c) (1975) (current version at 12 C.F.R. § 563.35(d) (1977)).

While the wording of the relevant state regulation is not as explicit as the federal provision, the state regulation also authorized the defendant to engage in this practice.[24]

It is established that a business practice authorized by federal and state law ordinarily will not be held to violate the antitrust laws unless it was adopted as a result of a conspiracy among competitors.[25] Here, of course, there is no alleged conspiracy between the defendant and its competitors. Defendant's decision to charge plaintiffs for legal expenses represented nothing more than a unilateral decision on its part to do what it was legally authorized to do. Since this decision was a legitimate business judgment which occasioned at most a minimal restraint on competition, we believe the disputed practice was reasonable in purpose and effect.

Plaintiffs argue, however, that the practice was nonetheless unreasonable because the defendant's purpose in retaining counsel to insure the security of its loans could have been accomplished by less restrictive means. They advance two alternatives in support of this argument. First, relying on the fact that certain other institutional lenders did not charge their borrowers for legal expenses, plaintiffs suggest that the defendant could have retained

[24] MD. CODE ANN. art. 23, § 161GG (1973) provides that:

> Every association may require borrowing members to pay all reasonable expenses incurred in connection with the making, closing, disbursing, extending, readjusting, releasing or renewing of real estate loans.

Legal expenses incurred to consummate a loan are "reasonable," if not indispensable and required by law. *See* Regulation 09.05.50C of the Maryland Building, Savings & Loan Associations Guide.

[25] *See, e.g., Kinee* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, 1974-1 Trade Cas. ¶ 74,927 at 96,154 (E.D. Pa. 1973), *cert. denied,* 419 U.S. 999 (1974).

its own attorney without requiring borrowers to pay its legal expenses. Alternatively, plaintiffs suggest that the defendant might have followed a practice of accepting loan settlements exclusively from borrowers' counsel.

In our view, the first alternative suggested by plaintiffs does not demonstrate that the defendant's practice is unreasonable. On the contrary, the fact that the other lenders did not require a payment for legal expenses confirms that plaintiffs were free to go elsewhere if better terms of credit were offered. By charging its borrowers for legal expenses, the defendant only availed itself of a practice sanctioned by law.

Similarly, we do not consider the second alternative advanced by plaintiffs an indication that the defendant's practice is unreasonable. Prior to 1971 the defendant actually followed a practice of relying exclusively on borrowers' counsel.[26] The defendant decided to change to its present practice of retaining its own counsel because the former practice proved to be an inadequate method of obtaining legal settlement services. Many attorneys employed by borrowers were inexperienced and unqualified in the field of title examination and real estate settlements. Others proved to be less concerned with the quality of title being conveyed than with facilitating the sale.[27] Under these circumstances, the defendant's decision to retain attorneys in whom it had confidence was clearly a reasonable one, adopted after practical experience with the alternative plaintiffs suggest.

We share plaintiffs' concern that in selecting attorneys upon whom to rely the defendant might properly have chosen a group of attorneys or at least more than a

[26] Under its prior practice, the defendant accepted settlements prepared by any attorney having the highest rating by Martindale-Hubbell. J.A. at 332-35.

[27] *See, e.g.*, J.A. at 177-85, 271, 332, 329-30, 334-35.

single law firm.[28] But we believe the defendant's failure to do so amounted on this record to a legitimate exercise of business judgment that is outside the scope of the antitrust laws. The defendants makes loans to borrowers having diverse interests and differing needs for legal services.[29] To require an assessment of those interests and needs, and in turn an examination of the qualifications and competency of counsel to conduct loan settlements, would be to impose an unreasonable burden upon the defendant. The antitrust laws do not require the defendant to set up the board of surrogate law examiners that would inevitably be required to implement the plaintiffs' alternative.

We also note that the defendant's present practice which permits borrowers to use virtually any member of the Maryland bar is in several respects less restrictive than the alternative suggested by plaintiffs. Many attorneys who are proficient in real estate law would necessarily be excluded under plaintiffs' alternative.[30] In ad-

[28] The defendant retained the Maryland law firm of Lancaster, Bland, Eisele & Herring. Several of the name partners of this firm have held, and continue to hold, high corporate positions in the defendant association, and one serves as its general counsel. We do not address the propriety of the defendant's decision to retain this law firm under any legal standard governing the defendant's business conduct other than that provided by the antitrust laws.

[29] The differing legal needs of borrowers are exemplified by two of the named plaintiffs in this case. The title binder issued to them contained four separate exceptions which jeopardized the security of title to their property. J.A. at 138-44. We note that, as a practical matter, the defendant must retain its own counsel for loans like those made to these plaintiffs, since, owing to lack of privity, the lender may have no recourse against borrowers' counsel for negligent certification of title. *See, e.g., Anderson* v. *Boone County Abstract Co.*, 418 S.W.2d 123 (S.Ct. Mo. 1967) (*en banc*).

[30] Qualified attorneys were in fact excluded under the defendant's prior practice. J.A. at 329-30, 334-35.

dition, since borrowers frequently select counsel for reasons other than those strictly relating to the attorney's qualifications in the field of real estate settlements,[31] it is likely that the criteria employed by the defendant to approve borrowers' counsel would in some instances result in the exclusion of borrowers' preferred counsel. A practice of relying exclusively on borrowers' counsel might not, therefore, be materially less restrictive from either the borrowers' or the defendant's viewpoint.

In short, we find that the alternatives proposed by plaintiffs offer no indication that the defendant's practice unduly restrained competition in the market for legal settlement services. While we recognize that under other circumstances this practice might be anticompetitive in purpose or effect,[32] those circumstances are not present here. The defendant's loan practice was instituted solely for a legitimate business purpose, and fully comports with plantiffs' right to counsel and the defendant's statutory right to charge borrowers for incidental legal expenses. Viewed in the circumstances disclosed by the record, the challenged practice does not violate the antitrust laws.

Affirmed.

[31] Indeed, one reason for the defendant's decision to institute the practice of retaining its own counsel was its dissatisfaction with inexperienced attorneys selected by borrowers. *See* J.A. at 271-73.

[32] For example, if a lender precluded its borrowers from selecting their own counsel, its designation of settlement attorneys would likely be anticompetitive and tend to inflate settlement costs. The defendant in this case, however, has not imposed any restriction on its borrowers' right to counsel.

LEVENTHAL, *Circuit Judge, concurring*: I concur in the result and the reasoning of the majority opinion. I add a word to note the problem, and it is a real problem as I see it, that an association may well, through its president or other managing official, be engaged in a combination in fact to "steer" legal business to its counsel (who may have business or personal ties with management, or both).

If a borrower must pay extra out of his own pocket when he hires another lawyer, but has no additional payment to make if he hires lawyer X, there is likely some steering of trade, and that is a "restraint."[1]

Where plaintiff fails in this case is that he made no tender of facts that such steering as takes place has been venally motivated. And there is a justification for the system developed in defendant's institution—namely, (1) It wants its own counsel Mr. X (for its own protection); (2) It is willing to waive retainer of Mr. X when plaintiff has already hired him, thus avoiding either waste, or a double fee to Mr. X for doing the same work.

The combination of justification in terms of saving to the borrower plus lack of any showing of venality in the circumstances warrants a finding as a matter of law that

[1] Nor is the possibility disproved on the ground that in any event the association would have this work done by X. Management may hesitate to insist on a particular counsel, as against the possible outcry from members or shareholders, if the annual report shows a very large sum paid to this lawyer by the association. But if a large part of that lawyer's income is recorded on his books as payments by a number of borrowers, and does not appear at all—either on his books or the association's—as a fee attributable to the association, that stills any possibility of embarrassing inquiry.

The matter would be completely set at rest, of course, if the association adopted the suggestion of the majority opinion and chose a group of attorneys for this work.

there has been no showing of an unreasonable restraint of trade.

If the defendant's loan practice were not "instituted solely for a legitimate business purpose," but rather from venal motivations, I think that practice quite possibly could be found "anticompetitive in purpose."[2] Judge Wilkey has authorized me to state that he joins in this opinion, and in its conclusion that the matter is open if another record makes a tender of venality.[3]

[2] Maj. op. at 14.

[3] The leading opinion on reasonableness is flavored with intimations of bribery. Standard Oil Company of New Jersey v. United States, 221 U.S. 1 (1911).

MacKinnon, *Circuit Judge*: I concur in the opinions by Judge Wilkey and Judge Leventhal.

No. 76-1455

A Modification of Concurring Opinion Per Leventhal, Circuit Judge, concurred in by MacKinnon and Wilkey, Circuit Judges by Adding Following to Fn. 3.

In seeking rehearing, plaintiffs-appellants put it that this concurring opinion carves out new ground, which they should have opportunity to explore, that they had properly been proceeding on the theory that the antitrust laws are concerned with effects of conduct, not intent or laudable purpose, citing Sullivan, Antitrust (West Pub. St. Paul 1976) at 194, and that the existence of intent as an element in a criminal antitrust offense, such as was involved in Standard Oil, is not applicable in civil cases which remain governed by "the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." United States v. United States Gypsum Co., U.S. (46 L.W. 4937, 4941 n.13). In Gypsum Chief Justice Burger goes on to say: "Of course, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct. See Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Thus cited is pertinent observation of Justice Brandeis (246 U.S. at 238):

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

It is hardly new law to say that context and purpose guide in determining whether the agreement or practice under consideration goes beyond the quality of incidental restraint, a familiar and not forbidden occurrence, and takes on the color of an unreasonable restraint, with a predominantly anticompetitive character.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-691

DANIEL C. FOSTER, et al., *Petitioners*,

v.

MARYLAND FEDERAL SAVINGS AND LOAN ASSOCIATION, *Respondent.*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN P. ARNESS
DAVID J. HENSLER
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorneys for Respondent Maryland Federal Savings and Loan Association

Of Counsel:

HOGAN & HARTSON
Washington, D.C. 20006

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COUNTERSTATEMENT OF THE CASE

Petitioners seek review of a decision, entered by the United States Court of Appeals for the District of Columbia Circuit on June 12, 1978, which is based on the reasons set forth in an Opinion [1] of the same date written by Circuit Judge Wilkey and concurred in by Circuit Judges Leventhal and MacKinnon. The peti-

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[1] The Opinion for the Court (hereinafter "Opinion") as well as a Concurring Opinion by Judge Leventhal are set forth in Appendix A to the petition. Footnote 25 of the Opinion was amended by the Court of Appeals on October 24, 1978 by an order which is set forth in the Appendix to this brief.

tioners' request for rehearing was denied *per curiam* on July 26, 1978. The Court of Appeals decision affirmed a directed verdict previously entered against petitioners by Judge William B. Bryant of the United States District Court for the District of Columbia.

INTRODUCTION

Respondent regrets the need for a detailed recital of the facts. Unfortunately, the petitioners' statement of the case so distorts the facts that the respondent is left with no alternative. Petitioners' purported description of the facts does not contain one single reference to the record and bears no resemblance to the evidence actually adduced at the trial. For example, petitioners' repeated references to "rebates" and "abusive" practices by lenders[2] are totally unsupported by the evidence and, in fact, petitioners' own evidence showed that there were no rebates here[3] and that the practice at issue was adopted to protect the lender's legitimate interests and benefited the borrowers as well as the lender.[4] In addition, in purporting to describe the pertinent facts, the petitioners have somehow failed to mention that the practice at issue was expressly authorized by federal regulation, and, despite the requirements of Rule 23.1(d), the applicable regulation is not even cited, much less quoted, in the petition.

[2] The only "abusive practice" shown by the evidence concerned the practice followed by one of the petitioners' key witnesses, a lawyer, who had charged borrowers for performing services which were actually performed by the lender's counsel. I J.A. 177-85. ("I J.A." refers to Volume 1 of the Joint Appendix used in the Court of Appeals; Volume II will be cited as "II J.A.")

[3] II J.A. 329, 463.

[4] See pp. 5-6 *infra*.

STATEMENT OF FACTS

Respondent Maryland Federal Savings and Loan Association ("Maryland Federal") is a federally-insured mutual association having its principal place of business in Hyattsville, Maryland.[5] Petitioners represent a class of borrowers who obtained loans from Maryland Federal between January 1, 1971 and Devember 1975 and who paid a charge covering legal fees incurred by Maryland Federal in making the loans.

Petitioners' antitrust claims concern Maryland Federal's practice of having the law firm of Lancaster, Bland, Eisele & Harring[6] ("Lancaster, Bland") draft the mortgages or deeds of trust and analyze the title insurance binders and loan documents prepared by borrowers' counsel in connection with loans made by Maryland Federal. In accordance with section 563.35[7] of the Federal Home Loan Bank Board regulations, the legal expenses incurred by Maryland Federal in connection with the loans are paid by the borrowers. This practice was adopted in January 1971.

Prior to January 1971, Maryland Federal had followed the practice of relying solely on the borrowers' counsel for the preparation of the loan instruments

[5] At the time the suit was brought, Maryland Federal was a state-chartered association but it became a federal-chartered association on September 16, 1975. It has been federally-insured at all times pertinent to the litigation.

[6] For loans made in Charles County, Maryland, the services described are performed for Maryland Federal by Edward Digges, Esquire.

[7] The pertinent portion of the regulation which was in effect when this suit was brought is quoted in the Opinion at 10. The regulation was amended in August 1976, and the amended version of the regulation appears at 12 C.F.R. 563.35(d).

and title binder, and borrowers were permitted to use any member of the Maryland bar who had been given the highest rating (A-v-l-g) in the Martindale-Hubbell legal directory (II J.A. 332-335). This practice proved to be unsatisfactory for a number of reasons. First, many attorneys with the highest overall rating were found to be inexperienced and unqualified in the field of title examinations and real estate settlements (II J.A. 332; *see also* II J.A. 271). Secondly, some attorneys who specialized and were well-qualified in handling title examinations and real estate settlements were excluded from consideration under the practice (II J.A. 329-330; 334-335). Finally, many of the attorneys used were chosen not by the borrowers but rather by real estate developers or brokers, and those attorneys tended to be less concerned about the quality of the title being conveyed than with facilitating the sale.

For all of these reasons, Maryland Federal in 1971 decided to change its practice in two respects. It eliminated the requirement that the borrowers' counsel have the highest rating in Martindale-Hubbell since that requirement had proved ineffective (II J.A. 349-350). At the same time, as a more effective means of insuring that it had good security for its loans, Maryland Federal instituted the practice of requiring borrowers to reimburse it for the cost of retaining Lancaster, Bland in connection with each loan to analyze the title binder and loan documents prepared by the borrowers' counsel and to prepare the mortgage or deed of trust (II J.A. 315-318, 322). Of course, in those cases where the borrowers are represented by Lancaster, Bland no separate analysis is done, and no loan review charge is made, since it would be pointless and wasteful to have those lawyers review their own work.

Lancaster, Bland's fee for preparing a mortgage or deed of trust is $35 (II J.A. 353). The firm's fee for reviewing the title binders and other loan documents prepared by the borrowers' counsel is $65. Maryland Federal instructs the settlement attorney to collect those amounts at settlement and to forward the amounts to the association (II J.A. 317-318). Those amounts are then paid to Lancaster, Bland (II J.A. 329, 343-344), and Maryland Federal does not profit in any way from the amounts collected.[8]

Lancaster, Bland's services in analyzing the documents prepared by the borrowers' counsel are directed to determining whether there are any matters of record which would affect the validity or marketability of the title to the property on which Maryland Federal's loan would be secured. Lancaster, Bland also checks the house location survey to confirm that the building restriction lines have not been violated and to be certain that all easements and rights of way have been located so as to assure that there are no material encroachments. In addition, the legal description of the property is checked to confirm that it is complete and correct (II J.A. 351-352). Lancaster, Bland reports any deficiencies to Maryland Federal and advises the association on how the deficiencies should be corrected. In certain cases, the law firm may also advise the association not to make a loan where there is a title problem which would substantially affect the value of marketability of the property that would secure the loan (II J.A. 340-342).

The most crucial portion of Lancaster, Bland's analysis involves its examination of the exceptions listed

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[8] II J.A. 329. *See also,* II J.A. 463.

in the title insurance binder. Those exceptions would not be covered by title insurance, and, hence, any problems concerning the exceptions could seriously jeopardize the security for the loan (II J.A. 270-271). Therefore, it is essential that the title binder exceptions be examined with particular care to determine whether there are any defects in title which could adversely affect the value of the property (I J.A. 209; II J.A. 271).

The testimony in this case amply demonstrated the need for careful examination of title binder exceptions.[9] The binder issued to one prospective borrower contained 14 separate exceptions, including a covenant prohibiting use of the property for any purpose other than operation of a sewage treatment plant (I J.A. 154-156). Another binder excepted from coverage a garage shown by the survey to encroach on adjacent property (I J.A. 149-152).

Lancaster, Bland's examination of the title binders and other loan documents protects Maryland Federal's interests because, as one of petitioners' expert admitted, many lawyers are inexpert in handling real estate transactions with the result that title may be left in a "sloppy state." (II J.A. 271-72.) The same expert also testified that title companies "do poor work for the most part." (II J.A. 273.) Indeed, the petitioners' own counsel conceded in pleadings filed in the district court

[9] In fact, the title binder issued to the Johnsons, two of the named plaintiffs, contained four separate exceptions including an easement which prohibited the erection of any structure within a forty-foot wide strip that ran across the property. Plaintiffs' title insurance expert conceded that if a house had been built within this forty-foot wide strip the holder of the easement could have demanded that the house be removed and any loss resulting therefrom would not have been covered by title insurance (I J.A. 138-39). See also I J.A. 139-44.

that "there may be settlement attorneys who are unqualified and perhaps some who fail even to live up to that low standard." [10]

ARGUMENT

Summary of Argument

Petitioners have deliberately misconstrued the Court of Appeals decision in an effort to create a reviewable issue where none exists. Petitioners contend that the decision requires proof of unlawful intent to establish a civil violation of section 1 of the Sherman Act. An examination of the decision shows that the Court of Appeals did not require proof of unlawful intent but instead considered intent as one of numerous "relevant facts" in evaluating an alleged restraint under the standard enunciated by this Court in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918). Thus, the Court of Appeals' decision presents no issue for review, and certiorari should be denied.

Petitioners Have Misconstrued The Court Of Appeals' Decision In An Effort To Create A Reviewable Issue Where None Exists

Petitioners have formulated the question presented on the premise that the Court of Appeals required proof of "unlawful purpose" to establish a civil violation of section 1 of the Sherman Act. The petitioners' only effort to support that contention consists of an argument on pages 10 and 11 of the petition which is based on a one-sentence excerpt from the Opinion and on a four-paragraph excerpt from the Concurring Opinion. An examination of those excerpts will show that petitioners' contention is wholly unfounded.

[10] Points and authorities in support of plaintiffs' motion and application for class certification, 9.

The Court of Appeals did not hold that proof of unlawful intent was required; instead, it held that intent is one of numerous considerations which may be relevant in determining whether an unreasonable restraint is present. As Judge Leventhal points out in an amendment to the Concurring Opinion, this is "hardly new law"[11] because intent has been one of the relevant considerations in evaluating alleged restraints since at least 1918 when the Court decided *Chicago Board of Trade* v. *United States,* 246 U.S. 231. In that case, the Court stated:

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. *The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.* [246 U.S. at 238; emphasis added.][12]

[11] Modification of Concurring Opinion at 2.

[12] Nor have the relevant facts changed in the sixty years since *Chicago Board of Trade* was decided. In *United States* v. *United States Gypsum Co.,* —— U.S. —— (46 L.W. 4937, 4941 n.13), the Court stated that a civil violation can be established "by proof of either an unlawful purpose or an anticompetitive effect" and then goes on to state that: "Of course, considerations of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct." Petitioners cite *Gypsum* and set forth the first portion of the quotation but, unaccountably, fail to include last sentence quoted.

In examining the opinion excerpts upon which petitioners have relied, it becomes readily apparent that the Court of Appeals was not establishing any new test but rather was performing precisely the type of analysis required by *Chicago Board of Trade.* The excerpt which petitioners quoted from the Opinion reads as follows:

> The defendant's loan practice was instituted for a legitimate business purpose, and fully comports with plaintiffs' right to counsel and the defendant's statutory right to charge borrowers for incidental legal expenses.

Thus, the Court of Appeals was considering the "reason for adopting the particular remedy" and "the purpose or end sought to be attained" which are precisely the considerations that the Court in *Chicago Board of Trade* held are relevant in evaluating alleged restraints of trade.[13] Moreover, there is certainly not the slightest suggestion in the excerpt quoted that intent was the only consideration or that proof of unlawful intent was essential to establish a section 1 violation.

[13] In evaluating the alleged restraint, the Court of Appeals also considered each of the other factors mentioned by this Court in *Chicago Board of Trade* such as the "facts peculiar to the business" to which the alleged restraint was applied (*see* Opinion 4-5, 12-14), the "condition before and after the restraint was imposed" (*see* Opinion 10, 12), the "nature of the restraint and its effect, actual or probable" (*see* Opinion 10, 12-14). 246 U.S. at 238. On all counts, the Court of Appeals concluded that no "unreasonable restraint" had been shown.

Similarly, in the excerpt quoted from the Concurring Opinion the lack or unlawful intent was only one of the relevant facts considered in evaluating the alleged restraint. Even in the short excerpt quoted, Judge Leventhal cites at least three other reasons for concluding that no unreasonable restraint has been shown —that the practice protects the lender, that it avoids wasted effort and that it obviates unnecessary expense to the borrowers. Again, this excerpt provides no support for petitioners' contention that the Court of Appeals was applying some new test under which proof of unlawful intent was required to establish a section 1 violation. Furthermore, if the Concurring Opinion ever left any room for doubt concerning the proper role of intent in evaluating an alleged restraint that doubt was certainly laid to rest by Judge Leventhal's Modification of the Concurring Opinion in which the relevance of intent, whether lawful or unlawful, is described in precisely the same terms as were used by this Court in *Chicago Board of Trade.*

Thus, petitioners' contention that the Court of Appeals decision requires proof of "unlawful purpose" to establish a section 1 civil violation is insupportable. Since the only issue upon which review is sought is premised on that contention, no issue exists upon which review could be granted.

Petitioners have made no effort to satisfy, or even to address, the criteria set forth in Rule 19(b) for use in determining whether review should be granted. In any event, there is certainly no conflict between the Court of Appeals decision and the applicable decisions of this Court. As shown above, the decision is entirely consistent with the Court's decision in *Gypsum*[14] and with

[14] See p. 8 n.12.

the *Chicago Board of Trade* standard[15] which is expressly adopted in the excerpt from *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978) that is quoated in the petition at page 14.

Similarly, there is no conflict with other Court of Appeals decisions on the same subject and none is even suggested. The only other Court of Appeals decision involving similar issues is *Forrest* v. *Capital Building & Loan Ass'n.,* 504 F.2d 891 (5th Cir. 1974), which is not only consistent with the decision of the Court of Appeals decision in this case but which was cited and relied upon in the decision. The unsuccessful appellants in *Forrest* also filed a petition for a writ of certiorari, and the petition was denied. 421 U.S. 978 (1975).

The other criteria set forth in Rule 19(b) are inapplicable, and, since the petitioners have not satisfied any of the criteria, the petition should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be denied.

Respectfully submitted,

JOHN P. ARNESS
DAVID J. HENSLER
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Attorneys for Respondent Maryland Federal Savings and Loan Association

Of Counsel:

HOGAN & HARTSON
Washington, D.C. 20006

November 24, 1978

[15] See discussion at pp. 8-10 herein.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

No. 76-1455

Civil 76-73

DANIEL C. FOSTER, ET AL., *Appellants,*

v.

MARYLAND STATE SAVINGS AND LOAN ASSOCIATION

Before: LEVENTHAL, MACKINNON and WILKEY, Circuit Judges

[Filed October 24, 1978]

Order

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court, filed by Circuit Judge Wilkey on June 12, 1978, in the above captioned case be, and it hereby is amended by inserting at the end of footnote 25 on page 11, immediately after the citation, and without commencing a new paragraph, the following:

> We do not intend to imply, however, that a practice which is *not otherwise reasonable* may be exempted from the antitrust laws merely because purportedly authorized by a state or federal regulation. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker* v. *Brown*, 317 U.S. 341, 351 (1943); *see also Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-74 (1973). We

rely on the cited regulations only as further evidence that the defendant's practice was unmotivated by an anticompetitive purpose.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk